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LIM KING KOW

v.

POLYWELL ENTERPRISE SDN BHD & ORS

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[PETITION NO: MT1-26-1-2005]
29 SEPTEMBER 2006

C ***COMPANY LAW:*** *Members' rights - Oppression - Application by petitioner for grant of an interlocutory injunction specifically in relation to rights issue contained and approved in a company resolution - Principles applicable - Serious questions to be tried - Justice of case - Whether damages an adequate remedy - Status quo - Balance of convenience*

D ***CIVIL PROCEDURE:*** *Injunction - Interlocutory injunction - Application by petitioner for grant of an interlocutory injunction specifically in relation to rights issue contained and approved in a company resolution - Principles applicable - Serious questions to be tried - Justice of case - Whether damages an adequate remedy - Status quo - Balance of convenience*

E

This was the petitioner's *inter partes* application for an interlocutory injunction to restrain the respondents, their directors, agents, proxies, candidates, nominees or others, from making any rights
F issue or carrying out any resolutions, decisions and/or actions which would have the effect of diluting the petitioner's 10% shareholding in the first respondent ('R1') as at the Extraordinary General Meeting held on 28 March 2005 ('EGM'). R1 was a company that had an authorised capital of RM5,000,000 in
G 5,000,000 ordinary shares at RM1 per share, of which 2,000,000 shares had been issued and credited as paid-up shares. The petitioner was an individual holding 200,000 shares representing 10% of the 2,000,000 ordinary issued and paid-up shares in R1. At the EGM, *vide* a resolution, a rights issue of 3,000,000
H ordinary shares of RM1 each was approved for all the shareholders, as a result of which the petitioner had to raise a sum of RM300,000 representing his 10% shareholding in order to take up the rights issue, failing which, he alleged that his shareholding in R1 would be diluted from 10% to 4%. The
I petitioner contended that under s. 181 of the Companies Act 1965 ('Act'), there were two serious questions to be tried *viz*.: (i)

whether the affairs of R1 or powers of its directors had been exercised in an autocratic manner in disregard of the petitioner's interest as a shareholder; and (ii) whether the rights issue was made for a proper purpose. The petitioner subscribed to the view that: (a) refusal of the injunction would permit the respondents to implement the rights issue, resulting in the dilution and near abolition of his rights of participation; and (b) damages would not be an adequate remedy.

Held (dismissing the petitioner's application):

(1) The two questions enumerated above by the petitioner were *bona fide* serious questions to be tried. (para 27)

(2) R1 had to carry on its business activities by making decisions by way of resolutions which must be put into effect so that the wheels of enterprise would not grind to a halt. The petitioner had not been prevented from voting at the EGM and the resolution had been legally and validly passed. The rights issue was also in line with the authorised capital of R1 which was RM5 million. The benefits of the rights issue manifested in the resolution had also been conferred on the petitioner, who was at liberty to accept, in which case there would be no dilution of his 10% shareholding in R1, and so his rights to requisition for an EGM under s. 144 of the Act and to participate in R1 under s. 149 of the Act would remain intact. The dilution of the petitioner's shareholding to 4% in R1 would only be a reality when the petitioner declined to take up the rights issue. The petitioner was given the option which he could exercise according to his best judgment. In the instant application, in the absence of any illegality in the holding of the EGM in which the resolution was passed, the justice of the case was in favour of the implementation rather than the negation of the resolution. (paras 36, 37 & 38)

(3) The issue as to whether damages would be an adequate remedy to the petitioner could be determined by reference to the monetary value that the parties had attached to their respective shares in R1. The tussle between the parties were purely in relation to the value of the shares *ie*, it is monetary in nature, in which case damages would undoubtedly be an adequate remedy to the petitioner in the event he succeeded at the conclusion of the hearing of the petition herein. (para 39)

(4) The petitioner had at all material time been holding 10% shares in R1; the *status quo* was therefore his 10% shareholding which he was so desirous of maintaining. The implementation of the resolution by the respondents and the taking up of the rights issue by the petitioner would most certainly give effect to the petitioner's desire in maintaining the 10% as the *status quo*. As a matter of fact, it was only the petitioner's own refusal to take up the rights issue that would displace the *status quo* from 10% shareholding to 4%. Therefore, it was not fair and equitable to restrain the respondents from implementing a valid resolution of R1 merely to accommodate the petitioner's refusal to comply therewith. The grant of the injunction would in fact disturb the *status quo*, and consequently run counter to the established governing principles. (paras 43 & 44)

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Dato' Jaffar Mohd Ali & Anor v. Jastera Bhd & Ors [2000] 8 CLJ 106 HC ***(refd)***

Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor [1999] 5 CLJ 376 HC ***(refd)***

Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors [1994] 1 MLJ 520 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors [1997] 2 CLJ 116 CA ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application [1994] 2 MLJ 789 ***(refd)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC ***(refd)***

Re Dalkeith Investments Pty Ltd [1984] ACLR 247 ***(refd)***

Re Jermyn Street Turkish Bahi Ltd [1971] 3 All ER 184 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 2 MLJ 227 ***(refd)***

Re Micropack Industries Sdn Bhd [1997] 3 CLJ Supp 459 HC ***(refd)***

Re Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 326 ***(refd)***

Re Tong Eng Sdn Bhd (Loh Loon Keng, Petitioner) [1994] 2 CLJ 775 ***(refd)***

See Teow Chuan & Anor v. YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors [1999] 7 CLJ 195 HC ***(refd)***

Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 63, 144, 146, 181(1)(a), (b), 218(1)(i),

Queensland Company Code [Aust], s. 320

Other source(s) referred to:

Walter Woon, *Company Law*, 2nd edn, p 452

For the petitioner - Leonard Yeoh; M/s Tay & Partners

For the respondents - Ellen Wong (KC Tho with him); M/s KC Tho & Partners

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

[1] This is the petitioner's *inter partes* application in encl. (5) for an interlocutory injunction to restrain the respondents, their directors, agents, proxies, candidates, nominees or others, from making any rights issue or carrying out any resolutions, decisions and/or actions which have the effect of diluting the petitioner's 10% shareholding in the first respondent as at the extraordinary general meeting held on 28 March 2005 ("the EGM").

[2] In the presence of all the respective learned counsel, I have on 29 March 2005 granted an ad interim injunction against the respondents and that ad interim injunction was extended on 12 April 2005, pending the disposal of encl (5).

[3] For brevity and convenience, a reference hereinafter to a section is a reference to that section in the Companies Act 1965 unless the context otherwise requires.

Factual Background

[4] The first respondent (R1) was incorporated on 22 February 1979 as a company having its registered address in Melaka. As at 24 March 2005, R1 has an authorised capital of RM5,000,000 in 5,000,000 ordinary shares at RM1 per share, of which 2,000,000 shares had been issued and credited as paid-up shares.

[5] The petitioner is an individual holding 200,000 shares representing 10% of the 2,000,000 ordinary issued and paid up shares in R1.

[6] The capacities of the second to seventh respondents (R2 to R7) in R1 are:

Respondent	Capacity
R2	shareholder-cum-managing director
R3	director
R4	director
R5	shareholder-cum-chairman
R6	director
R7	director

[7] At the material time, R1's shareholders are:

Shareholder	No of shares
R2	444,000
Mariah bt Ab. Samad	200,000
Rodzy bte Hashim	100,000
Teo Poh Boon Enterprise Sdn Bhd	856,000
Alwi bin Kadir	100,000

Mohamed Sam bin Sailan	100,000
Petitioner	200,000
Total	2,000,000

[8] R3 is R2's father who in turn is R4's father. The three of them are of the same mind, directly and indirectly holding 65% of the shares in R1 and are in control of R1's board of directors ("the BOD") consisting of R2 to R7.

[9] R1's primary business activity is development of land.

[10] The petitioner and R2 had known each other since 1969. In 1997, the petitioner and R2 incorporated Johor Bahru Pyramid Sdn Bhd ("JB Pyramid"), a construction company in which both of them were equal shareholders. Subsequently, through JB Pyramid they acquired several other property development companies including R1 in which R2 was appointed a director and the petitioner an executive director until 1996 when they fell apart, whereupon the petitioner resigned as its executive director. At that time, the petitioner and R2 jointly held 20% of the shares in R1. Subsequently, the petitioner agreed to buy all the shares owned by R2 in JB Pyramid, while the 20% shares owned by JB Pyramid in R1 were transferred to the petitioner and R2 equally ie, 10% each.

[11] The petitioner alleged that upon his resignation as R2's executive director, the BOD failed to produce minutes of the meetings of the BOD notwithstanding the petitioner's request.

[12] As at 31 December 2003, R1 had given its subsidiary companies loans amounting to RM21 million.

[13] On 8 November 2004, R1 had by an ordinary resolution approved a purchase of 25% of the shares in Busaria Plantation Sdn Bhd ("Busaria Plantation") at a consideration of RM4,875,291.50. Busaria Plantation owns about 15,000 acres of oil palm plantation ("the Busaria investment"). The petitioner alleged that the BOD has failed to prepare a feasibility study report.

[14] R1 declared a dividend of RM100,000 for the financial year ending on 31 December 2003, but the petitioner alleged that R1's unappropriated profits exceeded RM60 million.

[15] At the EGM, *vide* a resolution, a rights issue of 3,000,000 ordinary shares of RM1 each was approved, for all the shareholders as a result of which the petitioner has to raise a sum of RM300,000 representing his 10% shareholding in order to take up the rights issue, failing which, he alleged that his shareholding in R1 would be diluted from 10% to 4%.

[16] Since 1996, the petitioner has offered to sell his shares in R1 to the other members but there was no taker.

[17] In 2004 the petitioner again offered to sell his said shares at RM30 per share to R2 who through R6 counter-offered to buy at RM6 per share. The petitioner claimed that as at 31 December 2003, the net tangible asset is RM36.90 per share.

Governing Principles

[18] At this juncture, it is necessary for me to consider the functions of a judge hearing an application for interlocutory injunction, as enunciated by the House of Lords in *American Cyanamid Co v. Ethicon Ltd.* [1975] AC 396 and restated by our Court of Appeal through the judgment of Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 at pp. 305-306, as follows:

> (a) He should ask himself whether the totality of the facts presented before him disclosed a *bona fide* serious issue to be tried. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;
>
> (b) Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by the grant, against the harm that would result from its refusal; and
>
> (c) The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result between the date of the application and the trial proper and to maintain the *status quo.*

(See also *Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor* [1999] 5 CLJ 376, 380 HC; *See Teow Chuan & Anor v. YAM Tunku Nadzaruddin Ibni Tuanku Jaafar and 4 Ors* [1999] 7 CLJ 195 HC; and *Dato' Jaffar Mohd Ali & Anor v. Jastera Bhd & Ors* [2000] 8 CLJ 106 HC).

Serious Question(s) To Be Tried

[19] Petitioner's learned counsel Mr. Leonard Yeo contended that under s. 181, there are two such questions *viz*:

(1) whether the affairs of R1 or powers of its directors have been exercised in an autocratic manner in disregard of the petitioner's interest as a shareholder? and

(2) whether the rights issue was made for a proper purpose?

[20] The petitioner cited:

(a) *Re Micropack Industries Sdn Bhd* [1997] 3 CLJ Supp 459 HC; and

(b) *Re Dalkeith Investments Pty Ltd* [1984] ACLR 247.

[21] Learned counsel Mr. Ellen Wong and Mr. KC Tho submitted for all the respondents that there was no triable issue, and referred to:

(1) *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors v. Ling Beng Sung* [1978] 2 MLJ 227 PC;

(2) *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520 HC;

(3) *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184 CA;

(4) *Re Tong Eng Sdn Bhd (Loh Loon Keng, Petitioner)* [1994] 2 CLJ 775 HC;

(5) *Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors* [1997] 2 CLJ 116 CA;

(6) *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC;

(7) *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789 HC; and

(8) *Re Senson Auto Supplies Sdn. Bhd.* [1988] 1 MLJ 326 HC.

[22] In relation to the above submissions, it is necessary for me to stress the importance of acquainting oneself with the specific application presently under consideration, so as to direct oneself to the salutary practice of citing authorities which are relevant or useful to the parties relying on them.

[23] The application before me concerns the grant or refusal of an interlocutory injunction specifically in relation to rights issue contained and approved in a company resolution.

[24] I have had the opportunity of perusing all the aforesaid authorities cited for the respective parties herein. With the utmost respect, I find that none of them is relevant to the grant or refusal of an interlocutory injunction specifically in relation to rights issue.

[25] By way of illustration:

(1) In *Re Micropack Industries Sdn Bhd, supra,* the applicant applied under s. 63 to invalidate the allotment of shares to a director and shareholder who had loaned a sum of money to the applicant;

(2) *Re Dalkeith Investments Pty Ltd, supra,* concerns a full hearing of a petition for the winding up of the company on the grounds set forth in s. 320 of the Queensland Company Code or that it is just and equitable that it be wound up, which is the equipollent provision of our s. 218(1)(i);

(3) *Re Kong Thai Sawmill, supra,* relates to another full hearing of a petition for, *inter alia*, an order that the company be wound up under s. 181;

(4) *Jaya Medical Consultants Sdn Bhd, supra,* concerns the full hearing under s. 181(1)(a) and (b); so also in *Re Jermyn Street Turkish Baths Ltd, supra;*

(5) *Re Tong Eng Sdn Bhd, supra,* touches on the respondent's application to strike out a s. 181 petition;

(6) *Kok Fook Sang, supra,* involves an application for, *inter alia*, the appointment of an interim receiver;

(7) *Tay Bok Choon, supra,* concerns the trial of a petition to wind up the company under s. 218(1)(i);

(8) *Kumagai Gumi, supra,* involves the full hearing of a petition for winding up under ss. 181 and 218; so also in *Re Senson Auto Supplies, supra.*

[26] In the circumstances, I am of the view that none of the authorities can be said to be supportive of the parties' contention herein.

[27] Be that as it may, after considering the above submissions, I am of the view that the two questions enumerated above are *bona fide* serious questions to be tried. Hence I shall now proceed to the next step of my inquiry.

Justice Of The Case And Damages

[28] The petitioner subscribed to the view that:

(1) refusal of the injunction would permit the respondents to implement the rights issue, resulting in the dilution and near abolition of his rights of participation, on the basis of *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC; ss. 144 and 146; and

(2) damages would not be an adequate remedy, seeking support in *Tan Guan Eng & Anor. v. Ng Kweng Hee & Ors.* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74.

[29] The respondents took the stand that granting the injunction would render the Busaria investment in jeopardy and R1 would suffer damages which the petitioner would not be in a financial position to pay, adding that damages would be an adequate remedy should the petitioner subsequently succeed in his petition against all the respondents.

[30] I shall now consider the authorities cited for the petitioner.

[31] First, in *Lim Hean Pin, supra,* the plaintiff was a registered shareholder in the company ie, the first defendant therein. The plaintiff had obtained three *ex parte* injunctions, to restrain the first defendant from, *inter alia*, implementing and/or exercising the powers to effect certain resolutions passed at the 42nd annual general meeting ("the AGM") of the first defendant. The defendants applied to discharge the injunctions. The relevant facts

revealed that the notice calling for the AGM required all proxy forms to be deposited at the first defendant's registered office at least 48 hours before the AGM. However, the company's articles of association did not impose such a time limit. The plaintiff had appointed an advocate and solicitor to be his proxy who had duly lodged the requisite proxy form at the AGM but the plaintiff's proxy was excluded from the AGM on the ground that it had not been deposited within the requisite time period.

[32] Edgar Joseph Jr. J (later FCJ) dismissed the defendants' applications on a variety of grounds, including the denial of the plaintiff's voting rights as well as the right to vote by proxy contained in s. 149(1); and that the right to vote is one of the members' fundamental rights, in which event, excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote constituted an illegality.

[33] In the instant application, there was no allegation or complaint by the petitioner that the resolution passed in the EGM was tainted with illegality.

[34] Next, in *Tan Guan Eng, supra,* the plaintiff had obtained an *ex parte* injunction restraining the holding of an extraordinary general meeting. The defendant's application to set aside the injunction on the ground that there has been non-disclosure or misrepresentation of material facts by the plaintiff was dismissed by Edgar Joseph Jr J (later FCJ). It is significant to observe that the issue before the learned judge was not in relation to the grant or refusal of an interlocutory injunction to restrain the implementation of a company resolution pertaining to a rights issue.

[35] The nature, purpose and effect of a rights issue has been so succinctly stated by Walter Woon in *Company Law* 2nd edn. at p. 452 in the following words:

> In the case of a rights issue an offer (in the contractual sense) is made by the company to the existing shareholders. A rights issue is a means of raising new capital from the existing shareholders. Each shareholder is offered new shares in proportion to his existing holdings. A shareholder may decline to accept his rights, in which case there is no contract. If a shareholder accepts his rights, he will complete the necessary documentation and the company will at the appropriate time allot the new shares to him.

[36] R1 has to carry on its business activities by making decisions by way of resolutions which must be put into effect so that the wheels of enterprise will not grind to a halt. The petitioner had not been prevented from voting at the EGM and the resolution had been legally and validly passed. The rights issue is also in line with the authorised capital of R1 which is RM5 million. The benefits of the rights issue manifested in the resolution had also been conferred on the petitioner, who is at liberty to accept, in which case there would be no dilution of his 10% shareholding in R1, and so his rights to requisition for an EGM under s. 144 and to participate in R1 under s. 149 would remain intact.

[37] The dilution of the petitioner's shareholding to 4% in R1 would only be a reality when the petitioner declines to take up the rights issue. The petitioner is given the option which he may exercise according to his best judgment.

[38] In the instant application, in the absence of any illegality in the holding of the EGM in which the resolution was passed, I am unable to see how justice of the case is in favour of restraining its implementation. I would add that justice of the case is in favour of the implementation rather than the negation of the resolution.

[39] The issue as to whether damages would be an adequate remedy to the petitioner may be determined by reference to the monetary value which the parties have attached to their respective shares in R1. In my view, the tussle between the parties are purely in relation to the value of the shares i.e. it is monetary in nature, in which case damages would undoubtedly be an adequate remedy to the petitioner in the event he succeeds at the conclusion of the hearing of the petition herein.

Status Quo

[40] It was repeated for the petitioner that the rights issue would dilute the petitioner's shareholding in R1 and that the balance of convenience clearly lies in favour of the petitioner as R1 has sufficient unappropriated profits to raise the RM3 million share capital sought in the rights issue.

[41] The stand taken for the respondents is that the rights issue would not dilute the petitioner's shareholding and that the petitioner is compelling the respondents to purchase his 200,000 shares at RM36.90 per share which would amount to RM7.38

million, while the petitioner could continue to maintain his 10% shareholding merely by taking up the rights issue at RM300,000 only.

[42] At this juncture, it is useful for me to define the meaning of the expression *"status quo"* in the context of the facts in the instant application.

[43] The petitioner has at all material time been holding 10% shares in R1. The *status quo* is therefore his 10% shareholding which he is so desirous of maintaining. The implementation of the resolution by the respondents and the taking up of the rights issue by the petitioner would most certainly give effect to the petitioner's desire in maintaining the 10% as the *status quo*.

[44] As a matter of fact, it is only the petitioner's own refusal to take up the rights issue that would displace the *status quo* from 10% shareholding to 4%. The question is therefore whether it is fair and equitable to restrain the respondents from implementing a valid resolution of R1 merely to accommodate the petitioner's refusal to comply therewith. In my view, the answer is certainly in the negative. The grant of the injunction would in fact disturb the *status quo*, and consequently run counter to the established governing principles alluded to above.

Conclusion

[45] On the foregoing grounds, I dismiss the petitioner's application in encl. (5) and set aside the above ad interim injunction granted on 29 March 2005 and extended on 12 April 2005.

[46] On the issue of costs, in view of the parties' citation of the irrelevant authorities under the head "serious question(s) to be tried", I order the petitioner to bear only half the taxed costs.

[47] I also order that an early date be fixed for the full hearing of the petition herein.